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IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS, *et al.*, APPELLANTS,
vs.
GABRIELLA K. JORDAN, APPELLEE.

No. 179.

BRIEF FOR APPELLANTS.

JOHN J. HEMPHILL,
Attorney for Appellants.

JAMES HEMPHILL,
Of Counsel.

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STATEMENT OF FACTS.

Doctor Thomas Kearney, of Texas, executed his last will June 4, 1896, and died July 5, 1896, leaving as his heirs at law two children, to-wit: Edmund Kearney, of Mississippi, and Constance Kearney Vertner, of Virginia, who was a widow with three children, all minors, viz: Lillie K., Edmund K. and Thomas K., all these are now of age.

The testator's son, Edmund Kearney, died June 4, 1898, leaving a widow, but no children. His sole heir at law was Mrs. Vertner his sister, who died at Luray, Virginia, June 6, 1904, during the progress of this litigation. Her executors have been made parties to the record.

Doctor Kearney died possessed of real estate in Texas,

Virginia and the District of Columbia. In item 2 of his will, he describes his Virginia property, and in item 3 he specifically names and describes each piece of his real state in Washington, D. C., including by name No. 611 M Street, N. W.

By item 5, the testator devises all of his Washington real estate, including 611 M Street, to Doctor Leroy M. Taylor and E. S. Drake, in trust, to hold the same until January 1st, 1928, and by other items directs his trustees to pay the income from the trust property to certain beneficiaries.

Doctor Taylor declined to accept the trust, and Judge Drake qualified and has acted as sole trustee.

The will having placed the property in Washington in the hands of trustees for a fixed number of years, the question arose whether the will violated the law relating to perpetuities in the District of Columbia, and Judge Drake, the trustee, being advised that the will, in this regard, was contrary to the law of the District, and desiring to obey the law, filed his bill of complaint in the Supreme Court of the District, alleging that questions had arisen as to the validity of the provisions of Doctor Kearney's will relating to the real estate in the District of Columbia, and that he had been advised that said provisions were void because they attempted to create a perpetuity. He prayed the Court:

> 3. "That by a decree of this Honorable Court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised.
> 4. That he shall have such other and further relief as the nature of the case shall require." (R. 8.)

The defendants to this bill were Leroy M. Taylor, Trustee, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, Thomas K. Vertner and Gabriella K. Jordan.

With this bill of complaint a copy of the testator's will was filed as an exhibit. Mrs. Constance K. Vertner answered the bill alleging that she had been advised that the last will of her father, Thomas Kearney, was void in so far as it undertook to dispose of real estate in the District of Columbia, because it created an estate contrary to the law forbidding perpetuities, and she joined in the prayer to the Court for a *proper construction of the will,* on that point. (R. 22.) Miss Jordan, this Appelle, answered, stating that she was not advised as to the law governing such matters as were set forth in the bill and prayed the Court to make such decree as would protect her rights in the premises, and admitted the matters and things in said bill of complaint to be true. (R. 23.) On May 23rd, 1900, the case was calendared and heard, and after a month's consideration Mr. Justice Barnard on June 27, 1900, filed a decree as follows:

> "This cause having been calendared, was submitted on the pleadings filed therein and duly considered, it is, by the Court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate, and the same descended to his heirs at law." (R. 24.)

From this decree no appeal was taken by either party. On October 29, 1901 this Appellee filed a bill of review

in the Supreme Court of the District, alleging that she had been injured by said decree, praying that the same be reviewed and set aside and no further proceedings be had thereon, and that she "be permitted to remain in the undisturbed enjoyment of the rents and revenues derived from the real estate situated in the District of Columbia as provided in the 6th item of the said will." (R. 6.) Drake, Trustee, with Constance K. Vertner and Lillie K. Vertner, the latter then being of age, demurred to this bill. (R. 25-26.) It was heard on demurrer before Justice Anderson who refused to set aside the decree of Justice Barnard, but on the contrary affirmed the same, excepting therefrom the allowance of forty dollars per month given by the 6th item of the will to the Appellee in this case. (R. 33-4-5.)

Mrs. Vertner having died, her executors were made parties to the record and they with Lillie K. Vertner and Drake, trustee, appealed to the Court of Appeals. (R. 47.)

Miss Jordan did not appeal. That Court, April 4, 1905, affirmed the decree of the Supreme Court with costs. (R. 57.) Judge Drake did not appeal from the decree of the Court of Appeals but the executors of Mrs. Vertner with Lillie K. Vertner, having been allowed to sever, by order of Court, of April 13, 1905, appealed to this Court, and the appeal was granted in open Court (R. 58).

ASSIGNMENT OF ERRORS.

1. The Court below erred in overruling Appellants' demurrer.

2. The Court erred in not sustaining Appellant's demurrer, and in not dismissing the bill of review.

3. The Court erred in holding that the provisions, in favor of Appellee in the will of Thomas Kearney, are valid.

4. The Court erred in holding that the provisions of said will in favor of the Appellee are valid, and can be en-

forced, while the other provisions of the same will, relating to property in the District of Columbia, are void and can not be enforced; and that the provisions in favor of the Appellee can be wholly separated from the other provisions of the said will and can be enforced independently of the other provisions relating to said property without injury to other parties named as beneficiaries in said will.

5. The Court erred in not dismissing the bill of review for want of proper parties, and in awarding relief to Appellee when the record disclosed that Mary B. Kearney, the widow of Edmund Kearney, the deceased son of Thomas Kearney, had not been made a party to the suit.

POINTS AND AUTHORITIES.

There are three principal questions in the case:

First: Did the testator violate the law in this jurisdiction relating to perpetuities, when he placed the title to his Washington property in the hands of trustees until 1928, without power of alienation?

Second: If the trust thus created is void, are the provisions of the will also void which dispose of the income of this trust; or can the claim of this Appellee for a part of the income from the trust property be separated from the trust and from the other items of the will disposing of the balance of the trust income, and be sustained as wholly separate from and independent of the other provisions of the instrument, and will this be the will of the testator?

Third: Have the necessary parties been brought into Court?

I.

As to the first question: It seems to be clear that the testator violated the law of this jurisdiction when he placed the title to his Washington real estate in the hands of

trustees, without power of alienation until 1928. After separately enumerating in item 3 of his will each piece of this property, he passes the title to the Trustees in the following language, in Item 5 (R. 9).

> "Having full faith in the integrity and business capacity of Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake of Port Gibson, Mississippi, I hereby appoint them and *their successors*, as hereinafter provided, *trustees* for the purpose of managing all the real property in item 2 and 3 of this will, from and after my death, *continuously* until the *year 1928*, subject, however, to the conditions and limitations hereinafter imposed, and *devise* to them, the said Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake, of Port Gibson, Mississippi, and their successors, *all and singular*, the property mentioned in item 2 and 3 hereof, in trust for the uses and purposes and under the conditions hereinafter mentioned. Said trust to be continued in them and their successors until *the first of January, 1928*; said trustees and their successors to have full, free and *absolute possession and control of the same until the date last above mentioned*, with full power and authority to let and lease the same for said period, and to collect all rents and revenues accruing therefrom, with full power and authority to take all necessary steps either in or out of Court to collect said rents and revenues, and to protect and preserve said property."

Does this violate the law relating to perpetuities?

The law relating to perpetuities in this jurisdiction has been defined by this Court to be:

> "A limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the term of gestation in cases of posthumous birth."
>
> Ould vs. Washington Hospital, 95 U. S. 303-312.

This has been embodied in the Code of this District, passed since the execution of testator's will, in the following language:

> "Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."

It is the same in other jurisdictions.

"The rule against perpetuities, by which every devise or bequest is void which may by possibility not take effect within a life or lives in being and twenty-one years after."

Jones vs. Habersham, 107 U. S. 174-176.
McArthur vs. Scott, 113 U. S. 340-381-382.

The rule applies to the possibility of non-vesting.

Proprietors vs. Grant, 3 Gry. 142-153-155.
1 Perry on Trusts, Section 380-381.
Sears vs. Putnam, 102 Mass. 5.
Barnum vs. Barnum, 26 Md. 119.

It applies to equitable estates and trusts.

1 Perry on Trust, Section 382.
Bigelow vs. Cady, 171 Ill. 209.
Andrews vs. Lincoln, 95 Me. 541.

If the suspension be for a fixed period without reference to a life or lives, such period can not exceed twenty-one years flat.

"Where the original rule against perpetuity is in force,

* * *a devise *to vest* at the end of a *fixed period of time*, without regard to lives in being, is void under the rule, where the time fixed *exceeds twenty-one years*, even though the aggregate term will probably be less than a life in being and twenty-one years."

Page on Wills, Sec. 632.

"Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is twenty-one years absolute."

Andrews vs. Lincoln, 95 Me. 541, 50 A. 899, 900.

"Where the accumulation is for *a gross number of years*, the rule against perpetuities *prohibits more than twenty-one years.*"

Kimball vs. Crocker, 53 Me. 263.

Under the New York Statute, limiting the suspension to *two lives in being*, as well as under similar statutes of other states, it is held that if a *gross or absolute term of years* instead of lives is taken as the measure of suspension, the statute is violated however short the term may be.

Beekman vs. Bonsor, 23 N. Y. 298, 316.

Rice vs. Barrett, 102 N. Y. 161, 6 N. E. 898.

Cruikshank vs. Home for Friendless, 113 N. Y. 337, 20 N. E. 64.

In re Walkerley's Estate, 108 Cal. 627, 41 P. 772, 777.

DeWalf vs. Lawson, 61 Wis. 473, 21 N. W. 615, 617.

Rule one of law and not of construction.

"The rule against perpetuities is not a rule of construction, but a peremtory command of law. It is not like a rule of construction, a test more or less artificial to determine intention. Its object is to *defeat intention.* Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provisions so construed, the rule is to be *remorselessly applied.*"

Gray on Perpetuities, Sec. 629.

"The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument by which you investigate the *expressed intention of the testator*. You take his words and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole *intention* expressed by the words *could* lawfully take effect."

Pearles vs. Mosely, 5 App. Cas. (House of Lords) 714-719. Per Lord Selborne, Lord Chancellor.

"It is against the settled rule of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found *to be the testator's wishes, must be taken to be his wishes*, and *if these wishes offend against the rule*, the gifts would fail, and must fail accordingly."

Heasman vs. Pearse, L. R. 7 Ch. App., 275, 283.

CASES WHERE PROVISIONS SIMILAR TO THOSE IN SUIT WERE HELD TO VIOLATE THE RULE.

(a) Fidelity Trust Company, etc., vs. Lloyd, (Ky) 78 S. W. p. 898.

Held: A will providing that testator's real estate shall not be sold or encumbered for forty years after his death (the income thereof to be meanwhile paid to his children and grandchildren), and then shall be divided among those who shall then be the heirs of the testator's body, though the restriction is to be removed in case the land shall be taken into the limits of a certain city, is void as in violation of the rule against perpetuities.

The Court said:

"In our opinion, the trust attempted to be created by this will is obnoxious to the rule against perpetuities and

to section 2360 of the Kentucky Statutes of 1903, for the reason that it unlawfully suspends the power of alienation for a longer period than during the continuance of a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. Testator plainly provides that his real estate shall remain in the hands of his executors for the gross period of forty years without reference to any life or lives in being. The law permits the vesting of an estate and the power of alienation to be postponed for a life or lives in being and twenty-one years and ten months thereafter; but if the vesting of the estate or interest is postponed or the power of alienation suspended for a longer period, it is unlawful, and the devise or grant is void."

(b) *Andrews vs. Lincoln, 95 Me., 541, 50 A. 898.*

A testator devised all his estate to trustees to hold, manage, sell, invest, and accumulate the proceeds, etc., for thirty years, and with discretion to pay from income or principal of the trust fund such sums as to them seemed fit, for the maintenance, etc. of testator's grandchildren and of his son and his son's wife. The will then proceeded as follows:

"At the expiration of said thirty years, the whole of said fund or estate * * * * *shall become the property of* my said two grandchildren, in equal shares," and in case the grandchildren should be then deceased, it should vest in certain other persons.

Held: That the attempted trust offends the rule against perpetuities.

The Court said:

"In this case, lives in being do not form a part of the period of postponement. *It is a gross term of thirty years.* Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is twenty-one years absolute * *. If the estate was then to "become" the grandchildren's, and that is the language of the will, we think it was not vested in them before * * *. We hold therefore that this attempted

trust offends the rule against perpetuities, in that it postpones the vesting of the equitable interest of the cestuis que trustent beyond the period limited."

(c) *Coleman vs. Coleman, 65 S. W. (Ky.) 832.*

A will provided that the property of the testator should be held in trust by his widow for twenty-five years after his death, she to receive the income thereof for the support of herself and children, and that during the twenty-five years none of the children should have power to sell or convey his interest. At the expiration of the twenty-five years the estate was to be divided among the children and the heirs of those dead before that time.

Held: That the will was void as an attempt to create a perpetuity.

Observe that the Kentucky Statute against perpetuites (which is practically the same as that now in force in the District of Columbia) is held by the Court, in the case just cited, to be "simply declaratory of the common law."

(d) *Phillips vs. Heldt, (Ind.) 71 N. E. 320.*

A will directed that certain real property should be held and controlled by the executor, in trust, for thirty years from the testatrix's death, and at the expiration of that time, should be divided among certain persons or their heirs.

Held: That the provision contravened the Statute of the state against restraints on alienation and *the rule against perpetuities.*

The Court said:

"The suspension of the power of alienation in said will is not made to depend upon a life or any number of lives in being, but is fixed for a term of years. The suspension for a term of years, however short, is void."

(This case was decided under a Statute similar to the N. Y. Statute. See note on p. 4).

(e) *Speakman vs. Speakman, 8 Hare, 180.*

The testator directed the surplus income of his estate to be applied for the benefit of his children, and at the end of fifty years from his death that his estate should be divided among them or their heirs in their stead, and in case of the death of any child without issue, his share to go to the survivors or their heirs.

Held: That the limitation of the property at the expiration of the fifty years was too remote.

The Court (Sir James Wigram, V. C.) uses this language:

"The true way of reasoning upon a will like this is first, to ascertain what it is that the will directs during the period of fifty years, without reference to the question whether the gift, at the expiration of the term is good or bad; and if the direction during the period of fifty years, can be thus ascertained, the Court is not at liberty to alter the construction of the will, for the purpose of supporting the ultimate limitation at the expiration of the fifty years; that would be to make a new will for the testator, only because the rules against perpetuities prevent his will from being carried into effect."

(f) *Kimball vs. Crocker, 53 Me., 263.*

Bequest of $40,000 to trustees, to be kept invested and the interest thereon accumulated for twenty-five years, at the end of which period the fund was to go to testator's two grand-sons, and in case of their death without issue, before the expiration of the twenty-five years, then to testator's brothers or their lineal descendants.

Held: That the trust for accumulation was void, as being for a gross term of more than twenty-one years.

The Court said:

"When the accumulation is for *a gross number of years*, the rule against perpetuities *prohibits more than twenty-one years*. Whenever lives in being do not form part of the time of suspension or postponement, the only period

under the rule against perpetuities is twenty-one years absolute. * * * The trust for accumulation is void."

Not only do these authorities show clearly that the testator has violated the law relating to perpetuities, but every Judge that has passed upon the will in this case, has decreed that this provision of the will violated the law of this jurisdiction and is therefore void; and no appeal by any party to the case has been taken from that portion of either of the decrees.

Mr. Justice Barnard held:

> "That it was absolutely void and that Thomas Kearney died intestate as to this property and the same descended to his heirs at law." (R. 24.)

Mr. Justice Andreson held:

> "And therefore, as no power of sale is vested in the trustees, and the ultimate beneficiaries take no title until 1928, these devises are clearly void under the rule relating to perpetuities." (R. 33.)

Further he held:

> "In so far, therefore, as the will of the testator undertakes to vest the fee simple title to his Washington real estate in the beneficiaries therein named, his will is void to that extent at least, and the Court was clearly right in so holding." (R. 33-34.)

The Court of Appeals affirmed the decree of the Supreme Court quoted, with costs. (R. 57).

It is therefore settled that the will of the testator in so far as it attempts to create a trust covering his Washington realty is null and void.

II.

Second: If the trust attempted to be created by the testator covering the Washington property is void, does the provision for the Appellee fall with it?

Under the decisions of the Courts, the answer to this question depends upon the further inquiries as to whether the attempted trust embodies the main scheme or plan of the testator as to his Washington property; and whether the forty dollars per month which the trustees are directed to pay to Appellee, out of the income from the trust property, is dependent upon or connected with his general plan or scheme. The decisions of the Courts establishing this doctrine are clear upon this point. I cite the following:

Knox vs. Jones, 47 *N. Y.*, 393, 398.

In this case the rule for determining whether the invalidity of a trust affects other portions of a will is stated thus:

"A void trust which is separable from other valid trusts may be cut off when the trust thus defeated is *independent* of the other dispositions of the will, and *subordinate* to them, and not an *essential part* of the *general scheme*."

In our case, the main purpose of the will was to tie up the Washington property until 1928; the void trust therefore, is not only an essential part of the general scheme, but it is the general scheme itself. So far from being subordinate to the provision for Miss Jordan, that provision is wholly dependent upon and subordinate to the void trust.

Pitzel vs. Schneider, 216 Ill. 17, 74, N. E. 779.

An estate was devised in trust for the following purposes:

1. To manage, control, invest and collect the rents and profits thereof.

2. Out of such rents, etc., to pay one thousand dollars per year to the testator's widow for life and the balance of the income to his son and daughter for life, with directions as to the disposal thereof in case of the death of any of said persons.

3. After the death of the children, to divide the estate among the grandchildren that should attain the age of twenty-one, if a female, and twenty-five if a male.

Held: That that portion of the trust which directed a division of the estate as indicated under clause 3 supra, was void as a perpetuity and that its invalidity vitiated the other portions of the trust so that the whole was void.

The Court said:

"The trust attempted to be created by the will is an *entire and complete scheme* for the control and disposition of the property of the testator * * * The trust provisions cannot be held in part valid, and part void, without defeating, in part, the intention of the testator, hence they must be held invalid as a whole."

Lawrence vs. Smith, 163 Ill. 149, 45 N. E. 259.

Testator bequeathed his property in trust to pay to his daughter an annuity of six hundred dollars, and on his death to her children an annuity of three hundred dollars each, until they arrived at the age of twenty-five years, at which time there should be paid to each child, as he arrived at that age, ten thousand dollars. If, at the death of the daughter, any of her children were of the age of twenty-five years, the said sum should be paid in lieu of the annuity. At the termination of the trust as to all beneficiaries and remaindermen, the property should be divided among the grandchildren then living.

Held:

1. That the direction for the division of the estate after the termination of the trust as to all the beneficiaries and remaindermen, and the provision for the children of the testator's daughters who might be born after his death violated the rule against perpetuities.

2. That the trusts being connected, so as to constitute one scheme, cannot be held valid as *to the annuities provided for the benefit of the daughter and children living at the time of testator's death.*

The Court said:

"It clearly appears that the trust created by the testator

was one entire scheme, upon which the execution in the main of the various provisions of his will was made to depend. Aside from the books, pictures, etc., bequeathed to the aforesaid three daughters by the seventh clause of the will, the validity of which is unquestioned, *there is no bequest made directly to any beneficiary*, but *directions only are given to the trustee to make certain payments out of the trust estate*,—some out of the principal, others out of the income * * *. We see no way by which a division of the trust created by this will can be made, and part held valid, and the rest invalid, without doing violence to the intention of the testator. It is all one entire scheme, and *although the trust is an instrument to effect the beneficial purpose of the testator, it is made the most prominent feature of the will.*"

Harris vs. Clark, 7 N. Y. 242, 257.

A trust to invest $30,000, and out of the income thereof to pay *$700 a year* to testator's sister, Nancy Harris, or in case of the sister's death, to his niece, the residue of the income to be accumulated until final distribution. At the death of the niece the principal and accumulations to go to her issue if she left any, and if the sister was then dead; and in case of the death of both sister and niece without issue then to certain other persons.

Held: That the trust for accumulation was void and that as the trust was *entire*, the annuity to the sister and niece failed also.

The Court said:

"As this trust is entire, *the annuity of $700 to Mrs. Harris and her daughter cannot be sustained.* The testator has directed that $30,000 should be invested, and that the whole income should be disposed of by the trustees in the manner prescribed. The trust to invest is not divisible, and being void in part, the whole is void."

Barnum vs. Barnum 26 Md. 19, 90 AM. Dec. 88.

A testator made the following provisions with regard to

certain hotel property, consisting of the hotel proper and an office part.

1. The entire property was devised to trustees in trust to lease the same, collect rents, etc., and out of the rents of the hotel part to pay certain sums annually to his wife and to his children and their heirs. The period during which the leasing was to take place and the trust to continue was to be so long as his children or any descendants of any of them should live.

2. The rents of *certain specific rooms* of the office part of the building *he devised* to *certain named children* and grandchildren and their heirs respectively.

Held: That *the trusts* to lease, etc., were void and that *the legacies of the rents of the rooms named were also void, as springing out of the trusts.*

The Court said:

"The trust being void in toto, we regard *the legacies springing out of them to be void also.* The power to lease being void, *the right to share in the distribution of the rents,* the fruits of the exercise of the power, must necessarily fail."

Coster vs. Lorillard, 14 Wend. (N. Y.) 265.

Devise to trustees in trust:

1. To pay annuities to certain of testators relations for life or until the death of all his nephews and nieces.

2. To pay the residue of the income to said nephews and nieces during their lives and to the survivor or survivors of them equally.

3. After the death of all said nephews and nieces, the estate to be divided among the children of such of them as might be then dead, per stirpes.

By a codicil, the testator gave certain legacies to his relations in addition to the provisions made for them by the trusts above set out.

Held: That the second and third trusts were void as

illegally suspending alienation, and that the annuities given by the first trust as well as the legacies given by the codicil though good in themselves fell with the illegal trusts.

Several of the judges delivered opinions but that of Senator Young best states the grounds of decision. He said:

"The trusts in the will being thus void in their creation, what result will follow with respect to the legacies and annuities which the testator, under what he assumed to be valid trusts, bestowed upon his relations? His main object was to secure his vast estate from partition or alienation for twelve lives, in order to give it to his grand-nephews and nieces who should then be living, and the decendants of such as should be dead; and in the meantime to distribute the annual rents and profits of his estate among his twelve nephews and nieces and the survivors of them. These prominent and controlling objects of the testator cannot be carried into effect. The great plan is destroyed and *to maintain the subordinate parts would be to make for him a new will * * The main intent and object of the will having failed,* the provisions for the relatives of the testator founded upon that intent, must fail also * * * * To substitute *portions* of a will for the *whole* where these portions are connected with the general intent of a testator, and which general intent is unauthorized by law, would lead to *dangerous results.* The will in all such cases would be changed into an instrument very different from what the testator designed. It would not be his will but the will of the Court."

See also:

In re Christie et al., 133 N. Y. 473, 31 N. E. 515.
Amory vs. Lord, 9 N. Y. 403.
28 Am. & Eng. Encyc. of Law, (2nd Ed.) 866,867.

What then is the general scheme of the testator with reference to his Washington real estate?

Evidently his plan was to tie it up until 1928, by which time he doubtless anticipated it would be greatly enhanced in value; and in the meantime he directs that the fruits

of the trust, coming to the trustees as rent, shall be paid partly to his daughter and her children, and partly to the Appellee.

By item 5 of his will, the testator explicitly and completely transfers all his Washington real estate to two trustees to be held: *"continuously* until the *year 1928;"* * * * * * *"said trust to be *continued* in them and their successors until the *1st day of January 1928."* (R. 9.)

To avoid any possible misunderstanding of his purpose, he inserts in item 8, which vests 611 M Street in one grandson, after the death of the Appellee, a proviso, that should his said niece die before the *1st day of January, 1928,* then his said nephew should only receive the rents and revenues until that date (R. 11.)

So in item 19, any property in the City of Washington not specifically disposed of by his will is devised to his trustees, provided, that if it be real estate, it shall be held *until the year 1928*; and again in the same item he declares that his grandchildren shall not come into possession and control of said property until the *year 1928.* (R. 19.)

So also by item 21 he provides that on the *1st day of January, 1928,* the title and ownership of the Washington property shall be vested in his grandchildren. (R. 20.)

Whenever the title of any of the real estate in this jurisdiction is mentioned by the testator, there is always a reiteration of his fixed purpose that the title shall not pass out of the trustees until *1928.*

Provision is made for the sale of the real estate in Virginia and in Texas, in the discretion of the parties named in the will. (R. 10-13.) As to the Washington real estate, no discretion is given to or to be exercised by any one. No authority is conferred upon the trustees, executors or other persons to dispose of this property under any conditions or circumstances whatsoever. Niether the death of the daughter or of the Appellee is in any way to alter or

affect the determination of the testator to have this property in one body until the expiration of the time fixed by him. Mrs. Vertner can sell the home over her head and buy a new one, the executors can sell the real estate in Texas and turn the money over to the trustees, but neither the trustees, executors or beneficiaries or all of them combined can dispose of this property in the District of Columbia. Undoubtedly therefore, the general plan of the testator was to have this property conserved in one body until 1928.

The trust thus created by the testator is not merely a part of the machinery for accomplishing a subsequent intention towards any objects of his bounty, but was primarily created and intended for the purpose of conserving this property and holding it together for a fixed period without reference to consequences. The disposition of the income was not a necessary element of the trust. It was an incident and an outgrowth, and of course, dependent upon it.

If the attempted trust embodies the general scheme or plan of the testator as to his Washington real estate, does the testaor's direction to his trustees to pay Appellee forty dollars per month—being a part of the monthly income of the trust property—rest upon the void trust, or is it wholly independent of it, so that it can be established without reliance upon the void trust?

The testator's will emphatically answers this last question in the negative.

He directed this sum to be paid to Appellee monthly by his trustees from the income of the property held by them in trust, and by no other person or persons whomsoever, and from no other source whatsoever. Who is to pay the money except the trustees? Where are they to get it except

from the income of the trust property? Nowhere within the four corners of his will can be found an intent or purpose by the testator that the Appellee shall be paid one penny separate from and independent of the trust he creates in item 5 of his will. On the contrary, every dollar to be paid to her by his direction is the fruit of this trust. How then is it possible to say that the provision of forty dollars per month for Appellee, and the void trust of item 5 are wholly independent of and entirely separated from each other.

It is not sufficient that the provision for the Appellee may be separated from those made for testator's daughter and his grandchildren. The thing that must be done is to show also that the provision for the Appellee is wholly separate from and in no wise dependent upon the void trust; and the Appellee must show from what other source than the void trust her money is to be paid.

The title to all the Washington property is covered by a single item placing it in the hands of trustees for a gross number of years; the provision for the Appellee is nothing more than a direction as to the payment of a portion of the income of the trust property and it has no reference whatsoever to the title. It seems impossible that this solitary item, covering solely a portion of the income of a void trust, should have the marvelous power of transferring the title and creating a valid trust, in the same property, that has been covered by a void trust.

It is said, however, that the testator specially directs that the income from 611 M Street shall be paid to the Appellee; but with equal clearness and force he specially directs that the income from the other nine houses in Washington shall be paid to his daughter, Mrs. Vertner, and for the support, education and maintenance of his grandchildren. (R. 10, 11, 19, 20.) The income in each instance comes from the void trust.

By item 8, he directs that in the event of Appellee's death before January 1st, 1928, "the rents and revenues derived from said lot (611 M Street), shall be disposed of in the same manner as provided in item 7 hereof, in regard to the rents and revenues of other property mentioned therein." Nobody pretends that this provision, or that of items 5 and 7 for Mrs. Vertner and her children, is independent of the void trust. On the contrary, the record shows that all parties concede that these provisions are absolutely void because the trust out of which they grow is void. And yet the rights of the Appellee, and of testator's daughter and her children, rest under the will, on one and the same indivisible foundation, which the Courts have destroyed absolutely.

If the trust as to all the Washington real estate is void, as is conceded by the record, how can subsequent provisions of the will relating solely to the income make that title legal which was before illegal, and legally transfer the tite to trustees when the testator's effort to do so was illegal?

Even if item 6 specifically sets apart the rents from 611 M Street for the Appellee, it does not extend to all the rents from all the trust property, or warrant the Court in giving her a first claim on all the funds the trustee may collect and a lien on all the property of the testator wherever situated. Surely this is the largest inference that was ever drawn from so small a premise.

Mr. Justice Anderson while decreeing that the trust is wholly void, excepts from the results of his decision the claim of the Appellee. In doing this, he makes statements as follows:

1. "In so far as lot 611 M Street is concerned, the *primary purpose of* the testator in writing into his will

item 6 and 8 was to provide therefrom, that is from the rents of said lot, for the support and maintenance of his niece during her life. (R. 36.)

2. "In the first place, it is not illegal in itself and in the second place it is easily separable from the other provisions of the will and is in no wise *dependent upon them either for its origin or execution.*" (R. 36.)

3. "It is not necessary in order to give full effect thereto to restore the will in its entirety, for the simple reason that the will under consideration is one in which *separate* and *distinct trusts* are created. The trust in favor of the complainant is in the nature of a rent charge. It is something reserved out of realty or fixed as a burden on an estate in lands, and in this case can be enforced by an appropriate proceeding as though it were the *sole provision* of the will." (R. 37.)

4. He was at the same time properly careful so to make it as not to interfere with the *alienation of the property itself.*" (R. 38.)

5. "Instead, however, of defeating the *general scheme* of the will, complete effect can be given to item 6 without relying in the least upon the other clauses of the will, as the complainant can take under that clause of the will without regard to whether the other clauses of the will are good or bad, within the meaning of the law relating to perpetuities. The *trust created* in her favor is a *separate and independent trust.*" (R. 38 and 39.)

6. "The trust created in favor of this complainant, as I have already said, is in no wise dependent upon the other provisions of the will either for its *origin* or *execution.*" (R. 40.)

7. "Therefore he laid his hand upon *one particular piece* of his property and he said in effect, that while I shall write nothing in this will that shall affect the *right* of *alienation* of this property, I will write a provision that will insure to this complainant, my niece, the sum of at least, forty dollars per month during her natural life." (R. 40.)

8. "In other words, in the case at bar, the will segregates *a certain piece* of real estate from the entire

holdings of the testator and appropriates the rents and profits thereof to the separate use of one beneficiary."

In each one of these statements I submit, with all respect, that the Supreme Court fell into manifest error.

Replying thereto, I maintain that one item of a will, which disposes of the income from one specific piece of property, cannot be held to embody the *primary purpose* of the testator; and that it is a total misapplication of the principle of law, as to the primary purpose of a testator, to limit its application to one solitary item, which relates solely to the income from one solitary piece of property, the title to which has already been disposed of by other items of the will in conjunction with nine other pieces of property lying in the same jurisdiction. If the *primary purpose* of the testator can be gathered in this way, then the ascertainment of the general scheme and plan of wills upon which the Courts have laid so much stress, becomes of no value. Under such a rule the testator, instead of having one primary purpose with reference to property within a certain jurisdiction, might have ten or twenty, according to the number of paragraphs in his will.

To assert that this item of forty dollars per month for the Appellee is in no wise dependent upon the other provisions of the will, either for its *origin* or *execution*, is to forget entirely that the only source from which this money can be derived is from the property in the hands of the trustees, which embraces as well 611 M Street, as the other houses in Washington. So far from being independent of the other provisions of the will, the very source from which this forty dollars per month arises is created by the 5th item of the will establishing the trust. The trustees can have no income except from the property committed to them in trust. Item 6 of the will does not transfer the title of 611 M Street to the trustees. Item 5 does

do so. How then is it possible that the provisions of item 6 of the will are wholly independent of item 5? Just as well say that a stream of water is independent of the source from which it springs.

It is alleged that the trust for Miss Jordan is a separate and distinct trust. On the contrary, I respectfully submit that no trust was created for Miss Jordan. The testator in one item of his will directs that of the money coming into the hands of his trustees forty dollars per month shall be paid to Miss Jordan, primarily out of the rents of 611 M Street. That does not create a trust for Miss Jordan. The trust was created when the property was put in the hands of the trustees by item 5 of the will, and so far from Miss Jordan having a separate and distinct trust there is only one trust created by the will; her rights are wholly dependent upon it; she is simply one of a number of beneficiaries to whom a portion of the income from the trust is to be paid monthly. If the trust is good, her claim is good, and if the trust is void, her claim necessarily falls with it. Justice Anderson himself says, that what she has is "in the nature of a *rent charge* which is something reserved out of realty or fixed as a burden on an estate in lands." (R. 37.) Her rent charge comes out of the void trust and can come from no other source.

Justice Anderson cites the leading case of Shipman vs. Rollins, 98 N. Y. 311, establishing this doctrine which holds that "inasmuch as the bequest was void because it was not to be paid over until after the determination of three lives in being at the death of the testator, thereby resulting in *an illegal suspension of the powers of alienation beyond two lives*, the bequest of *the income* of the fund was likewise *void. The foundation being condemned, the superstructure resting upon it fell with it.*" (R. 39.)

It is said that the testator was careful not to interfere with the alienation of the property itself. It is conceded

that the title to 611 M Street, as to all the other Washington property was placed in the hands of trustees until 1928, and not only was the alienation of the property interfered with, but it was distinctly and absolutely prohibited, and for that very reason, Justice Anderson himself has held, that the trust in the will was absolutely void.

It is said that the testator wrote nothing in his will that affects the right of alienation of this property. This is directly in the teeth of the decision of Justice Barnard, Justice Anderson and Chief Justice Shepherd.

Fnally it is asserted that the will segregates a *certain piece* of property from the whole of the property of the testator and appropriates the rents and profits to one beneficiary.

On the contrary, the testator specifically includes this one piece of real estate in the item transferring all of his Washington realty to trustees. Justice Anderson himself holds that all the Washington property is embraced in the void trust. (R. 33.) Even if the testator had segregated one piece of property and appropriated the income specifically, does that furnish a basis for a judgement against all the property of the testator wheresoever situated? To hold that the specific mention of one piece of property embraces all the property of a testator in three separate jurisdictions, is a most dangerous doctrine. It has been done in this case for the benefit of Miss Jordan. I submit that it is wholly without warrant either in the testator's will, or in the law of the land.

These statements and conclusions set forth in the opinion of the Supreme Court of the District of Columbia being, I submit, every single one of them, without proper foundation in fact or law, cannot form a proper basis for excepting Miss Jordan's claim from that of the other beneficiaries of the testator's bounty and from a trust conceded to be absolutely void.

The Court of Appeals in its judgment merely refers incidentally to that portion of the will creating the trust from which the money to be paid the Appellee is derived, and proceeds to state that: "The following items of the will *only are of importance in the determination of this case.*" The Court then cites items 6, 7, 8, 20 and 21 in so far as they relate to the claim of the Appellee.

The easiest of all ways to find that one item of a will is wholly independent of the others is to disregard the other items entirely. The Counsel for Appellee appear to have persuaded the Court of Appeals to adopt that method in this case. The judgment of the Court of Appeals does not reiterate the statements made in the judgment of the Supreme Court above quoted, but cites a number of cases to sustain the position taken by the Court. An examination of these together with those cited by Justice Anderson will, I submit, show that they do not sustain the position that Miss Jordan's claim is independent of the trust.

CASES CITED BY THE JUDGES BELOW DISTINGUISHED.

In *Savage vs. Burnham 17 N. Y. 561* the valid limitations were sustained on the *express ground* that thereby the *general plan of the testator would be promoted rather than defeated.* (See p. 576 of case.) But in the case at bar it can not reasonably be said that the *"general plan"* of the testator would be promoted rather than defeated by destroying entirely his cherished scheme of tying up the property for a fixed period while preserving the provision for Appellee. In short, the illegal scheme itself was the *"general plan,"* with regard to the Washington property. Therefore the preservation of the provision for Appellee can in no way promote the *"general plan"* of the testator. On the

contrary, the *"general plan"* must fail in all events and hence the provision for Miss Jordan, a subordinate and dependent part thereof must also fail under the authorities already cited.

In *Harrison vs. Harrison 36 N. Y. 543* a testator provided that the income of his estate should go by means of a trust to his widow and children, one third thereof to his widow and two thirds to his six children in equal parts with limitation over to each child's issue upon attaining twenty-one of the respective portion of that part of the testator's estate to the income of which their deceased parent was entitled.

Held: That the limitation over was void. But the provision for the *payment of income* to his children was preserved on the ground that to do so *would not* defeat the *"general intent"* of the testator, which the Court held was to provide for the family during their lives, this object being accomplished by the Courts preserving the *income provisions*, the capital going absolutely to the issue of the children upon the death of said children. In the case at bar, however, the *"general intent"* of the testator, viz.: to tie up his estate, etc., can not be preserved, therefore it is distinguished from the case cited for the reasons given in the criticism of *Savage vs. Burnham, supra.*

In *Burley vs. Everlyn, 16 Sim. 294*, the facts were very different from the present case. There was no definite time fixed for the duration of the trust nor was the testator's *primary intention and general scheme the creation and continuance of an illegal trust* as is the case here. In the case cited the testator simply intended to provide for his nephew and his nephew's issue *and that was his primary and main intent*, and the Court sustained the provisions so far as valid, the invalid parts being clearly separable from the valid.

In Blagrove (not "Gladdner") vs. Hancock, 16 Sim.

371, the question of the separibility of the valid provisions was *not raised and was not passed upon or mentioned.*

In *Tiers vs. Tiers 98 N. Y. 568*, the provision sustained were preserved upon the ground that they embodied the *"general scheme" and "primary disposition"* of the testatrix, and that of the two ulterior contingent limitations which were void, the one was "quite separable from the *primary trust* and merely *incidental*, its only purpose being to provide for a contingency which may never arise," and that *the failure of that provision "would not affect the general scheme,"* while the invalidity of the other void provision did not affect (it was held) the *"primary disposition in trust."*

In the case at bar, however, so far from the void provision being "incidental" and *not affecting the "general scheme"* or "primary disposition in trust," it *is* the *"general scheme" itself* or primary disposition in trust, so that the decision in the case cited is no authority for sustaining the subordinate and dependent provision for Appellee.

Oxley vs. Lane, 35 N. Y. 340. Here again the ground upon which the provisions valid in themselves were sustained was, that the void provision were *"not an essential part of"* the testator's *"scheme of disposing of his estate"* and might be dropped *"without affecting the primary disposition of his estate."* Hence it is clearly no precedent for the case at bar for the reasons given under *Savage vs. Burnham, and other similar cases, supra.*

In Van Schuyver vs. Mulford, 59 N. Y. 426, a testator gave his estate to trustees and after *first* providing that his widow should have the income so far as necessary for her support, in another and subsequent clause provided that after the wife's death, the income should go to the daughters, and at their death that the capital should go to their issue.

Held: That the devise over to the issue of the daughters was void; but that the provision for the wife was not af-

fected, *being the "primary object"* of the testator and not being *inseparably connected with the invalid provisions.*

But surely in the case at bar the provision for Miss Jordan is not the *"primary object"* of the testator with reference to the Washington property. He did not carefully and in emphatic language tie up the *whole of said property* in trust for a fixed period, for the *primary purpose of providing* for Appellee. On the contrary, the provision for her is merely a *subordinate and dependent part of the general trust scheme and was so intended by the testator.*

In Burns vs. Allen, 89 Hun. 552, 35 N. Y. S. 342, the testator by the *Seventh Clause* of his will devised the residue of his estate to *trustees to aplpy the income to the support and education of his daughter.*. By the *Ninth Clause* he provided that in case the daughter left children the estate should go to them equally when the youngest child reached twenty-one, and if none of them reached that age that the estate should go to the nephews.

Held: That the validity of the Seventh Clause was not affected by the Ninth Clause, because, in the language of the Court "the provisions of the *Seventh Clause created the trust* and for the purpose of its execution, they are *complete and independent of those which follow"* (that is of those of the Ninth Clause).

In Loring vs. Blake, 98 Mass. 253, the Court was concerned with a question of powers, and seems to have held that an invalid exercise thereof did not affect a valid exercise in the same instrument, on the ground that the invalid provision might be dropped *without affecting* her "general scheme" or "main purpose." The facts were very unlike those herein and the general reasoning of the Court is in favor of our contention.

Lovering vs. Worthington, 106 Mass. 86., devise of certain real estate to trustees to pay the *rents and profits to testator's daughter for life and at* her death to her children

and at the death of each child a portion of the estate to go to his or her heirs absolutely.

Held: That if the limitations to the heirs of the children were void it would not defeat the prior life estates. In that case the provisions sustained were *prior to, separable from, independent of* the foundation of the subsequent limitations supposed to be invalid. Whereas, in the case at bar the provisions for Appellee is *subsequent to the void provisions* (item 5 of will) is expressly *founded and made dependent thereon* and is an *identical part thereof.* In short, the present case is the converse of the one cited.

In Graham vs. Whitridge (Md.) 57 Atl. 609, the provisions were very similar to those in Lovering vs. Worthington, just noticed, to wit: a prior devise of life estates to the children of testatrix's nephews with a subsequent remainder in fee to their descendants.

Held: That the life estates to the children were not affected by the invalidity of the limitation over to their descendants.

To this case the same remarks apply as to the Lovering vs. Worthington, supra.

In Leonard vs. Burr 18 N. Y. 96. there was a devise of certain property to B *until* a *certain place should be incorporated as a village* and *then* to the trustees of said village in trust to establish a library.

Held: That the estate of B terminated upon the happening of the contingent event, the incorporation of the place, irrespective of the validity of the devise *of the* subsequent estate to the trustees. The grounds of the decision were: (1) That the estate in B was a base or *qualified fee* which *would in any event regularly terminate* of itself upon the happenings of the contingency and was therefore unaffected by the devise over.

(2) That the decision would preserve the "general intent" of the testator.

Neither of these grounds exist in the present case. Furthermore in the case cited there was *no trust created* in the first instance but *only after the termination of the base or qualified fee* in B. Whereas, in the case at bar *the illegal trust* is *first* created, and the provision for Appellee is subsequently founded and made dependent thereon.

In Saunders vs. Vautier 4 Beav. 115, and in *Curtis vs. Lukin 5 Beav. 147* the question of the separability of the valid and invalid portions of a will was *neither raised or discussed,* as a glance at the cases will show.

In Dupre vs. Thompson 8 Barb. (N. Y.) 537, the question was whether certain trusts in a *conveyance inter vivos* were legal. The Court *held* that they were *legal,* and made the purely *obiter* remark that *if* they were illegal it would not affect other trusts in the same instrument. The only *point decided* was as to the legality of the trusts attacked as illegal and invalid *per se.* Furthermore, the nature of the instrument's provisions is only partially shown by the report. Clearly, then, under such circumstances the *purely obiter* remark of the Court above referred to is authority for no proposition. The dictum that the legal parts will be preserved if they do not of necesstiy *uphold* the illegal parts is unsound on its face, and in direct conflict with all the authorities we have been able to find.

In Goldsborough vs. Martin 41. Md. 488, a testator devised one-half of his estate to his wife in trust to pay over the income to his daughter. In case of the daughter's death without issue, the will provided that the trust estate should go to the wife in fee, but in case the daughter should leave issue, the trust should be extended to and for the benefit of said issue in the same manner as directed in the case of the daughter.

Held: That the clause extending the trust for the benefit of "the issue" of the daughter was void as violating the rule against perpetuities. But that its invalidity did not affect

the previous trust for the benefit of the testator's daughter.

The distinction between this case and the one at bar is obvious. In the first place, in the case cited, the testator's "primary intention" was naturally to provide for his daughter. (He had already amply provided for his wife by other clauses of the will.) In making this provision, however, he did not wish to give her the absolute control of the property, but restricted her to a life estate. Cutting off the illegal limitations left both these intentions intact, viz, his *primary intention* to provide for his daughter and his intention that she should have only a life estate. But in the case at bar, the *primary intention* of the testator was *not to give forty dollars a month to Appellee* but to *tie up* his Washington estate *so that his daughter and her children* should have ample provision therefrom and yet have no control thereof until the expiration of a fixed period. He wished to guard against their indiscretion and *accumulate a large property for them.* Now this whole primary intent or general scheme is illegal so that it cannot be preserved in any event.

In view therefore of such radical difference in the facts of the two cases, the decision in the case cited is no precedent herein.

James vs. Veasley, (cited as in 14 Hun. 523) seems to be wrongly cited as I have been unable to find it in the volume named.

I pressed upon the attention of the Court of Appeals, the injustice of selecting one out of a number of beneficiaries to whom the income of the trust property was to be paid according to the will, all of them standing upon exactly the same footing, and to be paid from the same income, derived from the same property, by the same trustees and at the same time. Responding to this suggestion, the Court declares:

> "By the terms of her bill the complainant *limits* her right of review to so much of that decree only as undertakes to annul the trust for her benefit in lot 611 M Street, N. W., and in so far as it may affect her contingent right to a monthly income of forty dollars during life, to be made up from the revenues of other property in the District of Columbia in the event that the revenue of the said lot shall fall short of that sum." (R.55.)

Manifestly, the Court overlooked the third prayer in the bill of review which begins with these words:

"That for the reasons and errors and under the circumstances aforesaid, *the said final decree may be reviewed and set aside and no further proceedings be had thereon.*"

The prayer is that the entire decree may be both reviewed and set aside and no further proceedings be had thereon.

The opinion of the Court of Appeals hinges upon the proposition that:

> "On the other hand, a trust for general purposes may be void because unauthorized by law without necessarily rendering void a particular trust in the same will made to subserve another purpose that is authorized." (R. 55.)

To support this, the Court relies upon Savage vs. Burnham, 17 N. Y. 561, 576.

In reply I insist:

1. That when a testator creates a trust by placing all of his real estate lying in the District of Columbia in the hands of trustees for a gross number of years, and in another item of his will directs that the income derived by his trustees from one of the pieces of property in their hands shall be paid to one beneficiary, he does not thereby create a separate or distinct trust in that special piece of property.

It amounts to no more than an application by the testator of a portion of the income from the general trust, and is so connected with and dependent upon the general trust, that it must stand or fall with it, unless indeed there can be such a thing as living fruit from a dead tree.

2. The case of Savage vs. Burnham relied upon by the learned Chief Justice, I submit, does not support the doctrine announced by him. In that case, the testator devises his real estate in trust, the income to be paid to his widow during her life and after her death the corpus to be converted into cash and invested by the trustees, the income of which they were to pay to the children of the testator with remote limitations to others.

The Court held: That the provision creating the trust and placing the real estate in the hands of trustees was *valid;* that the provisions for the children of the testator were likewise valid, but that some of the remote limitations were invalid; and that inasmuch as the original trust was valid, the provision for the widow and the children could be sustained, notwithstanding the invalidity of the remote limitations, because they were within the law and because that thereby the Court was carrying out the *main purpose* and *intent* of the testator. In our case, the original trust is invalid, and no one can pretend that the allowance of forty dollars per month to his niece was the main purpose of the testator in making his will.

This case of Savage vs. Burnham is a fair sample of all the authorities relied upon in behalf of the Appellee. It creates a trust with directions to pay the income, first to the widow, second to the children, third to other beneficiaries. The courts uniformly hold that if the payment to the widow and the children is clearly the main purpose of the testator, the more remote limitations may be cut off without affecting the first two which fall within the provisions of the law.

In the case at bar, however, there are three beneficiaries, first, Mrs. Vertner, second, the grandchildren, and third, Miss Jordan, the Appellee. These three stand in equal right and are to be paid from the same fund, at the same time and by the same trustees. What authority is there in the case of Savage vs. Burnham, or other similar case, for holding that the Court is at liberty to select one of these three beneficiaries, and leave the other two; and after declaring the original trust void, to re-establish the claim of Miss Jordan and set up a trust in her behalf, solely upon one item of the will which merely directs the payment to her of a part of the income from the void trust; and then proceed to place the whole of the Washington real estate in the hands of trustees, and give her a lien upon the property of the testator wherever situated?

If a single item of a will directing the payment of a small portion of the income from a trust, which has been declared void, can revive and resuscitate the trust, then the law relating to perpetuities is deprived of its whole force and effect.

I insist that item 6 of the will has no such inherent force and power as to create a trust for Miss Jordan and to override all the rights of her co-beneficiaries and all those provisions of testator's will, which have not been impugned or attacked in any way.

The point is made that inasmuch as the testator directs the income from 611 M Street to be paid to Appellee, he thereby creates a distinct and separate trust for her. That I insist is not the fact. But even if that be true, the Court is not warranted in extending this special trust by taking the whole of the Washington property from the heirs at law and placing the title in trustees, and giving the Appellee a first lien upon all the property of testator in Virginia and Texas.

Under the will of the testator, (R. 10) his property in Virginia could be sold and a complete title made, and if held as part of his estate, it was to descend to his grandchildren equally, at the death of their mother. Under the decree of the Court, no such sale can be made without the consent of the Appellee or without being subject to her lien, which of course would seriously affect the value; and if it descends to the grandchildren, it must be with the debt to Miss Jordan hanging over it.

The real estate in Texas is not in the hands of the trustees, and is not to pass into their hands. It is to be sold eventually and the money used for the grandchildren of the testator. (R. 13-14.) That portion of the will stands unimpeached, and yet the decree of the Court in this case gives the Appellee a first claim upon this property in the very teeth of the directions of the testator with reference to it, and all this is done under the theory that the Court is carrying out the testator's will.

According to the will of the testator, the title to 611 M Street, after 1928, and after the death of the Appellee, is to vest in Thomas K. Vertner; and the title to the other nine dwellings in Washington, after 1928, and after the death of Mrs. Constance K. Vertner, are to vest in the testator's three grandchildren.

By the will therefore, there are two conditions stated upon which the ten pieces of property of the testator are to vest in his grandchildren. The limitation of 1928 has been eliminated by the Courts declaring the trust to be void. Mrs. Vertner is dead. If the will of the testator is of any force as to his Washington real estate, the title to these nine pieces of real estate vested, upon Mrs. Vertner's death, in the testator's grandchildren. If the will is of no force then the property descended to them as his heirs at law at his death.

What authority is there in the Supreme Court of the

District of Columbia, or any other Court, to declare that the title to these nine dwelling-houses shall not vest in these grandchildren at the death of Mrs. Vertner, but that such vesting shall await the death of Miss Jordan? Her name is not mentioned by the testator in connection with the title to these pieces of property. If the will is of no force, the grandchildren must take as heirs at law. If it is of force, it is certainly as efficacious for the grandchildren as it is for the niece; especially when we remember that the testator, the owner of the property, specifically directs that it *shall* vest in his grandchildren at the death of their mother. I submit that there is no authority under the will, or under the law, to make the vesting of this property depend upon the life or death of some one whom the testator has not even mentioned in connection with it.

All these amazing results are said to be wrapped up in and come out of item 6, in which the testator, in the kindness of his heart, directs the application of a small part of the income from an illegal trust.

If the claim of Appellee is wholly separate from and entrely independent of the other parts of the will, why should this property be taken from the testator's grandchildren, and why should the will of the testator be rewritten so that the vesting of the title shall depend on Miss Jordan's death instead of Mrs. Vertners?

There is neither justice or law for holding that the rights of every other person named in the will of the testator, shall be made subservient to the claim of the Appellee, and that all of their rights shall be put in jeopardy in order that she may secure forty dollars per month. The testator has never said that this distant relative should wreck the prospects of his only descendants.

In Tilden vs. Green, 130 N. Y. 29, 50, it is held: That the rule holding that one trust may be valid and another

void is "applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or *work injustice among the beneficiaries,* or defeat the testator's scheme for the disposal of his property."

In this case, brought solely to determine whether a trust as to the Washington property is contrary to law, what authority has the Court below to give the Appellee a decree against the entire estate for all sums claimed to be due to her, past, present or future?

Her prayer is that the final decree in the original case be reviewed and set aside, and that "she be *permitted to remain* in the *undisturbed enjoyment* of the rents and revenues derived from the real estate *situate* in the *District of Columbia* as provided in *the 6th item* of the said will."

In response to that, the Court has created a new trust, given a money judgment and established a lien upon real estate not in the District of Columbia or mentioned in the 6th item of the will. The other beneficiaries receive nothing; Miss Jordan is given more than she asks for.

III.

HAVE THE NECESSARY PARTIES BEEN BROUGHT INTO COURT?

I insist that Mary B. Kearney, widow of Edmund Kearney, son of the testator, who died after his father, is a necessary party to the bill of review.

That all parties whose interests are to be affected by the judgment of a Court shall have a hearing before their rights are adjudicated, is one of the plainest axioms of law, and any other course is absolutely inconsistent with justice. Edmund Kearney, testator's son, died after his father, leaving a will which, having only one witness, could not pass

real estate in this jurisdiction, (R. 23). Hence Mary B. Kearney, as the widow of her deceased husband, is entitled to dower in the real estate of which Thomas Kearney, her husband's father, died intestate. Justice Barnard decreed in the original case that the testator died intestate as to all of his Washington real estate, and that it descended to his heirs at law. (R. 24.) That decree was confirmed by the Supreme Court of the District (R. 33.) and by the Court of Appeals, (R. 57.) and no apeal from it has been taken by any party to the case. It is now proposed to enter another decree declaring that as to this property Doctor Kearney did not die intestate, but that the Appellee has by his will, a first claim upon it for forty dollars per month. That cannot be paid to the Appellee without deducting a portion of the dower due and payable to Mrs. Kearney. The authorities showing who are necessary parties are perfectly clear.

"If any person, not a party to the original suit, becomes interested in the subject matter in controversy *by operation of law*, or under a distinct claim not derived from one of the parties, he *must* be made a party to the bill of review, and is not bound by the proceedings under it, unless he be made a party."

Debell vs. Foxworthy's Heirs, 9 B. Mon. (Ky.) 228, 231.

"*All whose interests* are to be affected by a decree should be made parties to a bill of review to reverse it."

Turner vs. Berry, 3 Gilman (Ill.) 541-43, citing—
Bank of U. S. vs. White, 8 Peters, 262-8.
Story's Eq. Pleading, 420.
Daniel Chan. Pleading and Practice, 6th ed., Sec. 1580.
Singleton vs. Singleton, 8 B. Monroe, 349-50.

Mrs. Kearney became entitled to dower in an undivided one-half of the real estate in the District of Columbia

(Rec. p. 23) upon the filing of the decree of June 27, 1900, declaring the will invalid as to the real estate in the District, and the said real estate descended to the heirs of testator as if he had died intestate. She, holding an interest in said real estate, was a necessary party to the proceeding in the lower Court.

2d Enc. of Law, 1st ed., 264.
Story Equity Pleading, Sec. 240.
Turner vs. Berry, sup.

On passing upon the question of the necessity of Mrs. Kearney being a party to the bill of review, the Supreme Court (Rec. p. 32) cites Fletcher's Equity Pleading, Sec. 925, as follows:

> "All parties whose interests are to be affected by the original decree are necessary parties to the bill of review."

Said section, by note, citing—

Turner vs. Berry, sup.
Creed vs. The Lancaster Bank, 1 Ohio st. 1.

The Supreme Court also cites the case of Corcoran vs. Couper, 2 Del. ch. 27, to the effect that a bill of review lies against those only who were parties to the original decree. In Fletcher, supra, the contrary doctrine, to-wit, "that all parties whose rights are affected are necessary parties to the bill of review," is laid down in the text and supported by the recent decisions, but in a note the author refers to the case of Corcoran vs. Couper, above quoted, as being one instance in which the contrary doctrine was held many years ago, but there seems to be no authority supporting this case.

The Court of Appeals passing upon this objection states:

> "The objection that she was a necessary party was not raised by plea, answer or on the face of the demurrer, but by suggestion on the hearing founded

solely on the fact recited in the answer of Constance K. Vertner to the original bill, filed M[redacted] that [redacted] a widow [redacted] descendants. No request [redacted] that she be made a party to the suit, and the case proceeded to final decree without her. It is to be remarked also that there is nothing to show that she was living at the time the bill of review was filed."

The learned Judge has evidently overlooked entirely the bill of review filed by the Appellee. One of the chief grounds upon which it was contended that the original decree was void is stated as follows:

> "In adjudging, ordering and decreeing relief upon said bill in the *absence of proper and necessary parties to the suit*, neither the said Edmund Kearney (if living), or if he were dead, his personal representative having been made a party, nor any proof made that he died without issue him surviving, or that the said Constance K. Vertner was his sole heir at law, or that he died intestate."

In view of this record, how can it be said that this whole question of the rights of Mrs. Kearney depends upon the unsupported statement of the answer of Mrs. Vertner to the original bill? Appellee charges want of necessary parties in the original case, neglects or refuses to make them parties to her case and then prays the Court to give judgment against them without a hearing.

Mrs. Kearney may not have been a necessary party to the original bill, because the will had been admitted to probate and was standing on the records of the Courts as a valid instrument. So long as it so stood, Mrs. Kearney had no interest in the real estate. But when Judge Barnard filed his decree she became a party in interest, her

rights were fixed by it, and she was a necessary party to any subsequent proceedings proposing to re-establish the will, or any part of it, and thereby, deprive her of her rights or any part of them.

Why should my clients be left to pay Mrs. Kearney $20 per month or suffer further litigation simply because Appellee won't take the trouble to bring all parties in interest into Court? While one party is being paid out of this property because the owner died intestate and another is paid because he died testate my clients are being ground betweeen the upper and nether millstone and it is all said to be the will of the testator!

No decree can be made in this case giving the Appellee forty dollars per month without depriving Mrs. Kearney of part of her rights in this property. Wholly outside of the unbroken current of decisions, the injustice of taking her property from her without an opportunity to be heard in Court is too manifest to require argument.

REPLY TO THE BRIEF FOR APPELLEE.

The points made by Appellee are as follows:

1. The annuity given in trust to Miss Jordan is for her lifetime, and the gift is valid. It may be readily separated from the other trusts, even if these other trusts shall be found to be in violation of the statute against perpetuities.

2. Mr. Justice Barnard was without jurisdiction to entertain the suit, and the decree entered by him is null and void.

3. All the trusts in the will are valid, and this Court may properly modify the decree of the Court below, so as to require that the Court of first instance shall entirely set aside the decree of 27th of June, 1900.

A. The first contention of Appellee has been so fully discussed in this brief, that it is unnecessary to reply at length.

I submit, however, that in the cases cited by the Appellee, the portions of the will held void did not embody the primary purpose or main intention of the testator, or the general scheme of the will as is the fact in the case at bar. Their invalidity therefore, did not invalidate the other portions of the will which were valid in themselves. The invalid provisions in those cases were subordinate parts of the will and could easily be cut off without affecting the general scheme or the main intent of the testator. In the case at bar, however, the main purpose and general scheme of the will with regard to the Washington property was to keep it in trust until 1928; the *void trust*, in fact, is not only an essential part of the general scheme, but is the *general scheme itself*.

Stress is laid on the fact that the annuity to Appellee is to be paid only during her lifetime. Does her Counsel know of any case where it was paid after the lifetime of the beneficiary? If not, wherein does this case differ from the others that the Courts have decided against the contention of the Appellee?

The Appellee relies upon Montignani vs. Blade, 145 N. Y. 3, 39 N. E. 719. In that case there was a provision that property should be held in trust for ten years, and at the end of that time vest in two persons named; but the testator further expressly provided that in case of the death of said persons before the expiration of the ten years, then the property should vest absolutely and *at once* in certain others. In other words, the testator expressly directed that in no event should the trust or suspension last longer than the lives of the two persons in being. Whereas, in the case at bar, Doctor Kearney plainly provides for the continuance of the trust absolutely and at all events until the expiration of the gross term. He distinctly reiterates that under no conditions shall the title to the property descend to the

parties named until the 1st day of January, 1928. The case from New York is just as much like the case at bar as it is possible for two things to be that are the exact opposites of each other.

In re., Hendy's estate, 118 Cal. 659-50 p. 753 cited by Appellee is a very different case from the one at bar.

There the life of "J. G." and a portion of the lives of her two children, viz., until they reached the age of twenty-five, were expressly fixed and selected by the testator as the measure of the period of suspension. So that the case is by no means one in which a gross or fixed term was selected as in the case at bar. Indeed the Court in the Hendy case clearly recognizes the distinction between that case and such a case as we have, where an absolute, definite and fixed term is chosen as the period of suspension.

B. Appellee's second contention is, that Justice Barnard was without jurisdiction to entertain the original suit and the decree entered by him is null and void.

This question can not be raised by a bill of review.

"A bill of review assumes that the Court had power to act, and therefore want of jurisdiction which renders the decree void is not ground for the bill."

16 "Cyc" 529.

In Friley vs. Hendricks, 27 Miss. 412-418, it was contended by the party filing the bill of review, that the Court had no jurisdiction of the original bill, and that therefore, its decree was void. The Court refused to consider the contention saying:

> "The objection is suicidal, for if there was no jurisdiction to render the original decree, there is no jurisdiction to review and reverse it."
>
> See also Donaldson vs. Nellis, 108 Tenn. 638.
> 69 S. W. 732.
> Berdanatti vs. Sexton, 22 Tenn. Chan. 699-703.

Independent of these authorities, however, I submit the Court had jurisdiction of the original bill.

(*a*) *To construe the will.*

"When a trust is created, however, equity has jurisdiction of a suit by the trustee or cestui que trust for the construction of a devise of real estate."

22 Ency. of P & Pr. 1194.

In Lorillard vs. Coster 5 *Paige* (N. Y.) 172, 175, *and Hawley vs. James id. 322,442,* Equity took jurisdiction of bills filed *by trustees* for the construction of wills, and furthermore passed on the *validity* of the trusts in the wills.

See also:

Minkler vs. Simms, 172 Ill. 323, 50 N. E. 176.
Eldred vs. Meek, 183 Ill. 26, 55 N. E. 536.

There is good authority that the existence of a trust is not necessary.

22 Encyc. of Pl. & Pr. 1192 and cases therein cited.
3 Pomeroy Eq. Jur. Sec. 1157 and cases cited.

(b) *To advise the trustee as to the validity of the trust.*

In Heald vs. Heald, 56 Md. 300-307, it is held:

"But this is an application by a trustee, under a will, directed to make large investments upon certain trusts and limitations, in regard to the *validity* of which and the rights of the parties in regard thereto, grave doubts have arisen. Under such circumstances, we are of opinion he is entitled to the aid of this Court, to instruct him as to his duties."

In *Neale vs. Davies* 5 *De. G. M. & G. 258,* a bill was filed against trustees to compel them to execute their trust., viz.: to transfer a certain fund to other trustees. The trustees answered that they *were in doubt whether the trust*

ought to be executed, inasmuch as there was no evidence of the settlors title to appropriate the fund.

It was contended that the trustees were estopped to take such a position by their acceptance of the trust, that they had no right to come into Court and impugn the validity of the trust. But the Court held otherwise, saying (per *L. J. Turner.)*

"It is true that the trustees accepted the fund upon the trusts of the settlement of 1831, but there is a doubt whether it ought to be held on those trusts.. It is said that they knew of the doubt when they accepted the trusts; but I take it to be the law, that if a trustee has accepted a fund upon certain trusts and then receives information making it doubtful *whether he ought to execute those trusts,* he has a *right to come to the Court* for its *direction whether the trusts ought to be executed.* How is the case *altered by his knowing of the existence of this doubt at the* time when he accepts the trusts?"

The above case is a complete answer to the contention of Appellee that a Court of Equity has no jurisdiction of a suit by a trustee seeking the advice of the Court as to whether his trust is unlawful, that is, *"whether it ought to be executed,"* for, of course, if a trust is unlawful *it ought not to be executed.*

Such a suit is no violation of the general rule that a trustee must execute his trust; for the rule is subject to the proviso that the trust *be lawful.* As said in *Wood vs. Wood 5 Paige (N. Y.) 596,* 28 Am. Dec. 451, 453.

"So far as the trusts of a will are *valid and consistent with the rules of law,* the executor and *trustee* is bound to carry them into effect."

The first contention of Appellee, viz.: That the bill fails to allege, or throws doubt upon, the existence of a trust, is contrary to the facts. The bill in the plainest language alleges the existence of a trust and sets out

the trust provisions. Neither does it throw doubt upon the *existence of the trust as a fact*, but simply requests directions whether said existing trust is lawful, that is, whether *it ought to be carried out*. It is exactly the case of Neale vs. Davies, *supra*.

The second contention is, that no directions are asked by the bill, but solely the construction of the will, and that therefore there was no jurisdiction.

First, not only construction is asked, but further "that he shall have such other and further relief as the nature of the case shall require." (Rec. 8): In other words be advised and directed whether, or how, or to what extent *he ought to execute the trust*, as in Neale vs. Davies, supra.

Second, in Eldred vs. Meek, 183 Ill. 26, 55 N. E. 536, and 538 it was held that where an active trust existed, the fact that the bill sought no other relief than that the will be construed was no ground for dismissal for want of jurisdiction.

The original bill was filed by Thomas P. Woodward, Esq., a learned and esteemed member of the Bar of the District of Columbia, in behalf of Judge E. S. Drake, of Mississippi, a gentleman of undisputed ability and standing at the Bar of his State, in whom the testator had such confidence that he apponted him trustee with full authority to manage his estate without accountability to any Court, and the presumption is that these gentlemen would not file a suit of any character in Court without a proper basis both in fact and law.

C. Appellee's third contention is, that all the trusts in the will are valid and that this Court may properly modify the decree of the Court below and require the original decree set aside.

Judge Barnard decreed that the testator's attempted devise of his Washington property was void, and that the property descended to his heirs. The decree in that par-

ticular was affirmed by the Supreme Court of the District and by the Court of Appeals, and no appeal has been taken by any party therefrom.

The Appellee having taken no cross-appeal can not be heard in opposition to the decree of the Lower Courts upon this point.

> "Parties who have not appealed, are not entitled to be heard in this Court, except in support of the decree in the Court below."
>
> The Slavers (Reindeer,)
> 2 Wall. 383, 394.

See also:

> Loudon vs. Taxing District 104 U. S. 771, 774.
> Mount Pleasant vs. Beckwith 100 U. S. 514, 527.
> Chitenden vs. Brewster, 2 Wall. 196.
> United States vs. Blackfeather, 155 U. S. 180, 186.
> Bolles vs. Outing Co. 175 U. S. 262.
> 2 Encyc. of Pl. & Pr. 157, 158.

The argument made by the Appellee on this point is: That in case the persons in whom the property is to vest should die before 1928, the trust would terminate and that the property must therefore vest, if at all, in the lifetime of such persons, and for that reason, the rule relating to perpetuities is not infringed. This argument is fatally defective.

It overlooks the main factor in determining whether a devise is an attempt to create a perpetuity, i. e., the *intention of the testator*. The question is wholly one of intention. The test is: Would the rule be violated by carrying out the intention of the testator? If so, the provision is void, irrespective of what actually happens or may happen.

The *intention* must first be ascertained and then the rule "remorselessly applied."

> Gray on Perpetuities, Sec. 629.
> Heasman vs. Pears, L. R. 7 Chan. App. 275-283.

Applying these principles to the case at bar we see that the question is, not whether the trust would or must in fact terminate with the lives of the persons referred to, but whether the testator *intended* it so to terminate. If he did not so intend, but on the contrary intended that it should continue at all events until 1928, then the provision is void under the well settled principle just referred to irrespective of the question whether it would actually terminate before that period. No one can read the emphatic unqualified language in which the testator provided for the continuance of the trust, and doubt that he intended it to continue at all events until the expiration of the fixed term.

He declares:

> "Said trust to be *continued* in them and *their successors* until the first day of January, 1928; said trustees to have full, free and absolute possession and control of the same until the date last above mentioned, with full power to let and lease the same." (R. 9.)

In the face of such language, we are not at liberty to assume for the purpose of avoiding the rule against perpetuities that the testator *intended* the trust to cease upon the death of the persons named as final takers. It follows that the Appellee's contention, based as it is, on a disregard of testator's intention or on the false assumption that he intended the trust to cease before 1928, is unsound—the intention being the controlling factor and that intention being that the trust should continue at all events.

In the second place, the argument for the Appellee overlooks the fact that the testator did not select the life or lives of any person or persons as the measure of the period of suspension, but chose to take a gross term of years as such measure. In such case, the authorities heretofore quoted show that if the term chosen exceeds twenty-one years flat, it violates the rule.

All the provisions of the will in behalf of the daughter and grandchildren of the testator having been declared void, and all parties having conceded that they are void, if the provision in behalf of the Appellee is sustained, the Court must be satisfied that this is under the circumstances and conditions of this case, *still* the testator's will.

It must be shown to the satisfaction of the Court, that if the testator had known that all the provisions for his child and grandchildren were fatally defective, he nevertheless would have provided forty dollars per month for the Appellee; that he would have tied up the whole of his Washington property, worth possibly $50,000 and yielding probably $3,000 per annum, in the hands of trustees, to secure to this niece forty dollars per month; that he would have given the Appellee a claim on all this property superior to that of his daughter and her minor children to be first paid, and always to be paid, even if his own descendants through fire, earthquake or other misfortune receive nothing; that he would have subjected the entire income of the Washington property to the charges and commissions of a real estate agent and of trustees, the two amounting to ten per cent, making an expense of $300 annually, to collect and pay over $480 annually; that he would subject his entire real estate in Washington, Virginia and Texas, worth possibly a quarter of a million dollars to a first and prior lien of forty dollars per month to continue during the whole of Appellee's lifetime, and thus enormously decrease the market value of the whole, and render it unsalable at a fair and just price.

It is manifest that Doctor Kearney has made no such will. It is equally manifest that no sensible man would make such a will, and I insist, that it is the greatest injustice, simply because the testator, in the kindness of his heart provided for the Appellee a small income, in conjunction with his daughter and her children, to ask the Court now to make

a new will in favor of the Appellee, and to do so under conditions that Doctor Kearney never for a moment anticipated; and in this way subject his grandchildren to the grossest wrong, by giving Appellee priority over them, and at the same time subjecting his estate to unwarranted charges and expenses and to great loss in its salable value.

To give judgment for the Appellee, it is necessary that the Court shall put its strong hand on $50,000 worth of Washington real estate, which by the decrees of all the Courts in this case, belongs to Thomas K. Vertner, Edmund K. Vertner and Lillie K. Jones, the testator's grandchildren, and has so belonged since July 5, 1896, the date of testator's death. The Court now must take this title out of those to whom the Court has given it and pass it into the hands of trustees to lease, repair, insure and otherwise handle; it must tie this up during the lifetime of this Appellee, possibly twenty or thirty years, and subject it to probable deterioration, damage and loss; it must give a first lien on all the real estate of testator and give a priority and preference to Appellee over the testator's grandchildren, the only descendants he has on earth.

And because the Appellee would not make Mrs. Edmund Kearney a party to the case, her rights can not be adjudged. She must therefore continue to be paid her dower monthly, because the testator died intestate: the Appellee must be paid her forty dollars per month because the testator died testate as to the same property, and the balance of the income must be paid to the heirs at law of a testator who died intestate.

Above all, this Court must adjudge, and it must go on record in this case, that Doctor Kearney has died testate and intestate as to the same property. All these absurdities must come out of his will, and they must all be found in item six!

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